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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JOSUE VANEGAS, Defendant and Appellant.	B213008 (Los Angeles County Super. Ct. No. BA329910)

APPEAL from a judgment of the Superior Court of Los Angeles County, Stephen A. Marcus, Judge. Affirmed.

Waldermar D. Halka, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Michael R. Johnsen and Lauren E. Dana, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant, Josue Vanegas, appeals the judgment entered following his conviction, by jury trial, for first degree murder and assault with a deadly weapon, with firearm and gang enhancements (Pen. Code, §§ 187, 245, 186.22, 12022.53).[1] Vanegas was sentenced to state prison for a term of 63 years to life.

The judgment is affirmed.

BACKGROUND

Viewed in accordance with the usual rule of appellate review (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established the following.

1. *Prosecution evidence.*

On June 28, 2007, defendant Vanegas was standing in front of his apartment building when a car pulled up. The driver was Adam Leon and the passenger was Fernando Castellanos. They were both members of the Clanton Street gang. Vanegas had been having a dispute with Leon's brother. Leon threatened Vanegas and challenged him to a fight. Then Castellanos said, "Hey, I'll get down with you." Castellanos opened the car door, produced a handgun, and fired three shots. Vanegas tried to flee, but Castellanos got out of the car, chased him, and shot him in the lower back.

At about 2:30 p.m. on August 24, 2007, police responded to a shooting in the area of Beverly Boulevard and Normandie Avenue. They found Castellanos's body on the ground in the middle of the intersection. He had been shot four times. The police also found Kwok Ng, who had sustained a superficial gunshot wound in the back.

Two witnesses, O.G. and R.R., had seen the shooting. They saw a man with a gun chasing after a group of people which included Castellanos. Castellanos fell behind and was unable to cross the street with the rest of the group when the light changed. He turned right and then tried to cross the street. The gunman shot him in the back. Castellanos fell in the street and the gunman started to leave, but then Castellanos moved his head. The gunman walked back over to Castellanos and shot him three to five more

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[1] All further statutory references are to the Penal Code unless otherwise specified.

times in the back. O.G. and R.R. got a good look at the gunman's face. They both identified Vanegas as the gunman in a photo array, at a live lineup, at the preliminary hearing, and at trial.

Two other witnesses, J.T. and L.L., heard gunshots and saw a Hispanic man running on Beverly Boulevard and then onto a side street. J.T. picked Vanegas out of a photo array, but was unable to identify anyone at a subsequent live lineup. L.L. identified Vanegas in a photo array and at a subsequent live lineup. Neither witness identified Vanegas at trial.

Los Angeles Police Officer Miguel Dominguez, a gang expert, testified Vanegas was a member of the Black Diamonds gang and Castellanos had been a member of the Clanton gang. The Black Diamonds date from the 1980's, while Clanton is one of the oldest gangs in Los Angeles. The two gangs had a serious rivalry at the time of Castellanos's death, a rivalry which sometimes resulted in violent assaults and murders. The territories claimed by the two gangs overlapped and Castellanos was shot on the border of an area claimed by both gangs. The primary activities of the Black Diamonds included "trafficking narcotics, assault with a deadly weapon, vehicle theft, homicide." Presented with a hypothetical based on the facts of this case, Dominguez opined the shooting had been committed for the benefit of the Black Diamonds gang.

2. *Defense evidence.*

Vanegas presented an alibi defense. J.D., the teenage son of Vanegas's girlfriend, testified that on a Friday morning in late August 2007, he went with Vanegas to drop his younger brother at elementary school. Instead of going to school himself, J.D. spent the rest of the day with Vanegas. They went with Vanegas's brother to a swap meet and to some stores. They returned home about 1:00 p.m. At 2:15 p.m., Vanegas went to pick up J.D.'s brother. He returned at 2:25 p.m. At 3:00 p.m., J.D. walked to school and back with Vanegas so his mother would think he had gone to school that day.

CONTENTIONS

1. Defense counsel was ineffective for letting the jury learn Vanegas had previously been arrested for assault with a deadly weapon.

2. Defense counsel was ineffective for not requesting a jury instruction on provocation.

3. The trial court erred by failing to properly instruct the jury on malice.

4. The trial court erred by failing to properly instruct the jury on the mental element of assault with a firearm.

5. There was cumulative error.

6. There was insufficient evidence to support the gang enhancement as to the shooting of Ng.

DISCUSSION

1. *Ineffective assistance of counsel: reference to prior arrest.*

Vanegas contends he was denied effective assistance of counsel because his attorney allowed the jury to learn he had previously been arrested for assault with a deadly weapon. This claim is meritless.

a. *Factual background*.

During the testimony of the first prosecution witness, Officer Jesse Audelo, the trial court asked about a conversation in which Vanegas had admitted his membership in the Black Diamonds:

"The Court: What is it that [Vanegas] said to you in the beginning of 2007?

"The Witness: I was handling a case involving him, and I asked his moniker. And he stated to me it was Sway."

Defense counsel then resumed his cross-examination:

"Q. What was your involvement in this investigation in the beginning of 2007, if I might ask?

"A. He was arrested for –

"The Court: Don't tell us that. Did you talk to him in 2007?

"The Witness: Yes.

"The Court: All right.

"Q. By [defense counsel]: And it was the beginning of 2007?

"A. Approximately. I don't know exactly the date.

"Q. And he was arrested for something?

"A. Yes.

"Q. What was that?

"A. He was arrested for ADW, assault with a deadly weapon.

"Q. Did anything ever come of that arrest?

"A. It was a reject on Vanegas.

"Q. When you say 'a reject,' could you tell the jury what that means.

"A. A reject is they refused to prosecute."

Vanegas argues defense counsel should have immediately objected, and moved to strike, Audelo's initial comment about handling a case involving Vanegas because it implied he had been in trouble with the law. Instead, counsel inquired further into the subject, eliciting the information Vanegas had been arrested for assault with a deadly weapon. Vanegas claims admission of this inflammatory evidence tainted his trial.

b. *Legal principles.*

A claim of ineffective assistance of counsel has two components: " 'First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.' [Citation.] To establish ineffectiveness, a 'defendant must show that counsel's representation fell below an objective standard of reasonableness. [Citation.] To establish prejudice he must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Citation.]" (*Williams v. Taylor* (2000) 529 U.S. 362, 390-391.)

"[T]he burden of proof that the defendant must meet in order to establish his entitlement to relief on an ineffective-assistance claim is preponderance of the evidence." (*People v. Ledesma* (1987) 43 Cal.3d 171, 218.)

"[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." (*Strickland v. Washington* (1984) 466 U.S. 668, 697.) "A defendant must prove prejudice that is a ' "demonstrable reality," not simply speculation.' [Citation.] Prejudice requires 'a reasonable probability that a more favorable outcome would have resulted . . . , i.e., a probability sufficient to undermine confidence in the outcome.' [Citation.]" (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1241.)

c. *Discussion.*

Whether or not defense counsel's performance was deficient[2] for allowing the jury to learn about Vanegas's prior arrest, there was no resulting prejudice.

Evidence of a defendant's prior arrests is generally deemed unduly prejudicial and inadmissible. (*People v. Anderson* (1978) 20 Cal.3d 647, 650 ["it has long been held that evidence of an accused's prior arrests is inadmissible"].) However, "[w]rongful evidence of police encounters is not as prejudicial as evidence of prior convictions, [and] 'even when improper evidence of a prior conviction is admitted [the error] . . . is not reversible in the face of convincing evidence of guilt[.]' " (*In re James B.* (2003) 109 Cal.App.4th 862, 874-875; see *People v. Stinson* (1963) 214 Cal.App.2d 476, 482 ["Improper

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[2] The Attorney General argues defense counsel's representation was adequate because he "ameliorated potential prejudice when he elicited testimony that the assault with a deadly weapon had been dropped." However, the reason for dropping the charge was unclear from Officer Audelo's testimony, and the jury might have concluded it was only because the victim(s) refused to cooperate with the authorities.

evidence of [even] prior offenses results in reversal only where the appellate court's review of the trial record reveals a closely balanced state of the evidence"].)

Although two witnesses identified him as the perpetrator, Vanegas argues "their identifications were equivocal" and that the other two witnesses "only identified [him] as a person running from the area of the shooting . . . ."

This argument is unpersuasive for two reasons: (1) since Vanegas was relying on an alibi defense, the fact two witnesses claimed to have seen him running from the crime scene is extremely incriminating; and (2) the identifications by the two principal eyewitnesses were not equivocal.

The two primary witnesses testified they got a good look at Vanegas's face, and they both picked him out of a photo array in September 2007, less than one month after the shooting. O.G. wrote on a form accompanying the photo array: "I think that the No. 5 looks like the guy who shooted [*sic*]. He had shorter hair . . . than the picture. His face, I think, is the same. 95 percent sure." In April 2008, O.G. identified Vanegas at a live lineup and filled out a witness card saying, "The suspect in my case is number 1." O.G. also wrote: "I am not a hundred percent sure, but he looks like the person I remember." O.G. identified Vanegas at both the preliminary hearing and the trial.

There was nothing equivocal about O.G.'s identification. Just because she was less than 100 percent certain of her identification did not make it equivocal. "It is a familiar rule that 'In order to sustain a conviction the identification of the defendant need not be positive. [Citations.] Testimony that defendant "resembles" the robber [citation] or "looks like the same man" [citation] has been held sufficient. . . .' " (*People v. Barranday* (1971) 20 Cal.App.3d 16, 22; see *People v. Cooks* (1983) 141 Cal.App.3d 224, 278 [identification evidence sufficient where witness was 90 percent sure].)

R.R. identified Vanegas at the September 2007 photo lineup, writing on the form: "The shooter that killed the other guy was picture No. 5. I'm positive the guy was the shooter." At the April 2008 live lineup, R.R. picked out Vanegas, although he also thought the perpetrator might have been one of the other men in the lineup. R.R. subsequently identified Vanegas at the preliminary hearing and at trial. Hence, although R.R. faltered slightly at the live lineup, he consistently identified Vanegas as the perpetrator.

In sum, the evidence here was not closely balanced. The eyewitness identification evidence convincingly pointed to Vanegas's guilt and, in defense, he relied on an alibi witness of questionable credibility. We conclude Vanegas could not have been prejudiced because the jury learned he had once been arrested for assault with a deadly weapon.

2. *Ineffective assistance of counsel: provocation instruction.*

Vanegas contends he was denied effective assistance of counsel because his attorney failed to request a jury instruction that provocation, even if insufficient to reduce murder to manslaughter, can reduce first degree murder to second degree murder. This claim is meritless.

"Provocation of a kind, to a degree, and under circumstances insufficient to fully negative or raise a reasonable doubt as to the idea of *both* premeditation *and* malice (thereby reducing the offense to manslaughter) might nevertheless be adequate to negative or raise a reasonable doubt as to the idea of premeditation or deliberation, leaving the homicide as murder of the second degree; i.e., an unlawful killing perpetrated with malice aforethought but without premeditation. [¶] . . . The existence of provocation and its extent and effect, if any, upon the mind of defendant in relation to premeditation and deliberation in forming the specific intent to kill, as well as in regard to the existence of malice [citation], constitute questions of fact for the jury . . . ." (*People v. Thomas* (1945) 25 Cal.2d 880, 903-904.)

In accordance with this principle, CALJIC No. 8.73 provided[3]: "If the evidence establishes that there was provocation which played a part in inducing an unlawful killing of a human being, but the provocation was not sufficient to reduce the homicide to manslaughter, you should consider the provocation for the bearing as it may have on whether the defendant killed with or without deliberation and premeditation."

"[W]here the evidence of provocation would justify a jury determination that the accused had formed the intent to kill as a direct response to the provocation and had acted immediately, the trial court is required to give instructions on second degree murder under this theory." (*People v. Wickersham* (1982) 32 Cal.3d 307, 329, disapproved on other grounds by *People v. Barton* (1995) 12 Cal.4th 186, 200-201.)

However, a second degree murder instruction is not warranted unless "the defendant's decision to kill was *a direct and immediate response to the provocation* such that the defendant acted without premeditation and deliberation." (*People v. Fenenbock* (1996) 46 Cal.App.4th 1688, 1705, italics added [instruction unwarranted because killing was not direct and immediate response to provocation: after punching alleged child molester, defendant drove to remote location with declared purpose of killing him, and there helped group of people stab and mutilate him].)

Here, shooting Castellanos was clearly not a direct and immediate response to Castellanos's having shot Vanegas, because that event occurred almost two months earlier.

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[3] CALCRIM No. 522 now provides: "Provocation may reduce a murder from first degree to second degree [and may reduce a murder to manslaughter]. The weight and significance of the provocation, if any, are for you to decide. [¶] If you conclude that the defendant committed murder but was provoked, consider the provocation in deciding whether the crime was first or second degree murder. [Also, consider the provocation in deciding whether the defendant committed murder or manslaughter.] [¶] [Provocation does not apply to a prosecution under a theory of felony murder.]"

Moreover, because Vanegas put on an alibi defense, there was no evidence that when he shot Castellanos his mind had been clouded by provocation. (See *People v. Johnson* (1993) 6 Cal.4th 1, 43, disapproved on other grounds by *People v. Rogers* (2006) 39 Cal.4th 826, 879 [instruction on provocation and second degree murder not required because "nothing in . . . defendant's statement . . . indicated *any* relevant effect on defendant's state of mind resulting from [the victim's] words or actions"]; *People v. Fenenbock, supra,* 46 Cal.App.4th at p. 1706 ["Fenenbock made no affirmative claim that he acted under provocation; he maintained that he did not participate in the killing. Having found that Fenenbock did participate in the killing, the jury could not have had reasonable doubt on whether the killing was premeditated"].)[4]

There was no ineffective assistance of counsel for failing to request a provocation instruction. (See *People v. Ward* (2005) 36 Cal.4th 186, 214 ["A trial court must give a pinpoint instruction, even when requested, only if it is supported by substantial evidence"].)

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[4] In addition, the jury's first degree murder verdict necessarily included a determination Vanegas had *not* killed while reacting to the alleged provocation. By returning a verdict of first degree murder under properly given instructions, the jury "necessarily resolved [this] factual question adversely to the defendant." (*People v. Mincey* (1992) 2 Cal.4th 408, 438; see *People v. Wharton* (1991) 53 Cal.3d 522, 572 [by finding first degree murder, jury necessarily found premeditation and deliberation, which are "manifestly inconsistent with having acted under the heat of passion"].) The trial court here, after defining the words "deliberate" and "premeditated," told the jury: "If you find that the killing was preceded and accompanied by a clear, deliberate intent on the part of the defendant . . . to kill, which was the result of deliberation and premeditation so that it must have been formed upon preexisting reflection *and not under a sudden heat of passion or other condition precluding the idea of deliberation*, it is murder of the first degree." (Italics added.) The trial court then defined second degree murder and ordered the jury – if it concluded there had been a murder – to determine whether that murder was of the first or second degree. Hence, by returning a verdict of first degree murder, the jury necessarily rejected Vanegas's theory he was prejudiced by a failure to give CALJIC No. 8.73.

3. *Trial court did not incorrectly instruct the jury on malice.*

Citing *People v. Rios* (2000) 23 Cal.4th 450, Vanegas contends the trial court erred by failing to properly instruct the jury on malice aforethought. This claim is meritless.

Rios said: "[I]n a murder case, unless the People's own evidence suggests that the killing may have been provoked or in honest response to perceived danger, it is the *defendant's* obligation to proffer some showing on these issues sufficient to raise a reasonable doubt of his guilt of murder. [Citations.] [¶] If the issue of provocation or imperfect self-defense is thus 'properly presented' in a murder case [citation], the *People* must prove *beyond reasonable doubt* that these circumstances were *lacking* in order to establish the murder element of malice. [Citations.] California's standard jury instructions have long so provided. (See CALJIC No. 8.50.)" (*People v. Rios, supra,* 23 Cal.4th at pp. 461-462.)

Vanegas argues, "Because there was evidence to support a theory that Castellanos was killed in response to his provocative conduct in trying to kill appellant . . . , the trial court committed *Rios* error in failing to properly instruct on malice aforethought . . . ." Not so.

"The heat of passion requirement for manslaughter has both an objective and a subjective component. [Citation.] The defendant must actually, subjectively, kill under the heat of passion. [Citation.] But the circumstances giving rise to the heat of passion are also viewed objectively. As we explained long ago . . . 'this heat of passion must be such a passion as would naturally be aroused in the mind of an ordinarily reasonable person under the given facts and circumstances,' because 'no defendant may set up his own standard of conduct and justify or excuse himself because in fact his passions were aroused, unless further the jury believe that the facts and circumstances were sufficient to arouse the passions of the ordinarily reasonable man.' [Citation.]" (*People v. Steele* (2002) 27 Cal.4th 1230, 1252-1253.) Vanegas is not entitled to a different standard of reasonableness just because he belonged to a gang. (See *People v. Humphrey* (1996) 13 Cal.4th 1073, 1087 [indicating disapproval of a reasonable gang member standard].)

Here, there was no evidence to support either the subjective or the objective aspects of a heat-of-passion voluntary manslaughter theory. The prosecution's evidence showed Vanegas, having been shot and wounded by Castellanos, exacted revenge two months later by killing Castellanos. Revenge negates heat-of-passion voluntary manslaughter. (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1144 ["If anything, defendant appears to have acted out of a *passion for revenge*, which will not serve to reduce murder to manslaughter"].) Having settled on an alibi defense, Vanegas provided no countervailing evidence.

The trial court made no error under *Rios*.

4. *Instructions on assault with a firearm.*

Vanegas contends his conviction for assaulting Ng with a firearm must be reversed because the jury was not instructed that an assault cannot be based on recklessness or criminal negligence. This claim is meritless.

Vanegas relies on *People v. Williams* (2001) 26 Cal.4th 779, which held: "[A] defendant guilty of assault must be aware of the facts that would lead a reasonable person to realize that a battery would directly, naturally and probably result from his conduct. He may not be convicted based on facts he did not know but should have known. He, however, need not be subjectively aware of the risk that a battery might occur. [¶] In adopting this knowledge requirement, we do not disturb our previous holdings. Assault is still a general intent crime [citations], and juries should not 'consider evidence of defendant's intoxication in determining whether he committed assault' [citation]. Likewise, mere recklessness or criminal negligence is still not enough [citation], because a jury cannot find a defendant guilty of assault based on facts he should have known but did not know [citation]. [¶] We also reaffirm that assault does not require a specific intent to injure the victim." (*Id*. at p. 788, fns. omitted.) "[A] defendant who honestly believes that his act was not likely to result in a battery is still guilty of assault if a reasonable person, viewing the facts known to defendant, would find that the act would directly, naturally and probably result in a battery." (*Id*. at p. 788, fn. 3.)

"The jury in *Williams* had been given an instruction indicating that assault had two essential elements: ' "1. A person willfully and unlawfully committed an act that by its nature would probably and directly result in the application of physical force on another person; and [¶] 2. At the time the act was committed, such person had the present ability to apply physical force to the person of another." ' [Citation.] After *Williams*, CALJIC No. 9.00 was revised to insert a third element, current element 2, which provides that the defendant must have been 'aware of facts that would lead a reasonable person to realize that as a direct, natural and probable result of this act that physical force would be applied to another person.' [Citations.]" (*People v. Miller* (2008) 164 Cal.App.4th 653, 662-663.)

The jury here was instructed with this new language. As the Attorney General explains, the jury instructions required "the defendant to act 'intentionally,' while being 'aware of facts' that a reasonable person would recognize as likely to injure another. Consequently, the instruction precludes a conviction based on mere recklessness or negligence." Vanegas fired multiple gunshots at Castellanos, who had been running with a group of people near a very busy intersection. The evidence shows Vanegas was aware of facts that would have led a reasonable person to realize an innocent bystander was likely to be hit by a stray bullet.

The trial court did not misinstruct the jury on assault.

5. *No cumulative error*.

Vanegas contends the cumulative impact of all of the above asserted errors deprived him of a fair trial. "However, we either have rejected his claims and/or found any assumed error to be nonprejudicial on an individual basis. Viewed as a whole, such errors do not warrant reversal of the judgment." (*People v. Stitely* (2005) 35 Cal.4th 514, 560.)

6. *Gang enhancement properly imposed for aggravated assault conviction*.

Vanegas contends the gang enhancement imposed on his conviction for committing assault with a firearm against Ng must be reversed. He argues there was no evidence this accidental shooting had been committed with the specific intent to promote, further or assist in any criminal conduct by gang members and, therefore, the enhancement cannot stand. This claim is meritless.

As we explained in *People v. Duran* (2002) 97 Cal.App.4th 1448:
"Section 186.22, subdivision (b)(1) imposes additional punishment when a defendant commits a felony for the benefit of, at the direction of, or in association with a criminal street gang. To establish that a group is a criminal street gang within the meaning of the statute, the People must prove: (1) the group is an ongoing association of three or more persons sharing a common name, identifying sign, or symbol; (2) one of the group's primary activities is the commission of one or more statutorily enumerated criminal offenses; and (3) the group's members must engage in, or have engaged in, a pattern of criminal gang activity. [Citations.]" (*Id*. at p. 1457.) The gang statute then requires two further elements: evidence of "a felony committed for the benefit of, at the direction of, or in association with any criminal street gang," *and* evidence the felony was committed "with the specific intent to promote, further, or assist in any criminal conduct by gang members . . . ." (§ 186.22, subd. (b)(1).)

Vanegas asserts, "Assuming arguendo the evidence supports the first [of these two final elements] . . . , there is insufficient evidence of the second element – that the crimes were committed 'with the specific intent to promote, further, or assist in any criminal conduct by gang members.' The second element requires that the defendant act with the specific intent to do more than commit the charged crime. [Fn. omitted.]" He argues "no evidence whatsoever was presented that [he] intended to shoot or assault Ng, an innocent bystander, or that he intended to benefit the gang by this accidental shooting." Vanegas is wrong.

The second element does not require a specific intent to benefit the gang; it only requires a " 'specific intent to promote, further, or assist in any criminal conduct by gang members . . . .' " (See *People v. Morales* (2003) 112 Cal.App.4th 1176, 1198 ["specific intent to *benefit* the gang is not required"].) And this element can be satisfied even though arguably the only gang member whose criminal conduct was furthered was Vanegas himself. "There is no requirement in section 186.22, subdivision (b), that the defendant's intent to enable or promote criminal endeavors by gang members must relate to criminal activity apart from the offense defendant commits. To the contrary, the specific intent required by the statute is 'to promote, further, or assist in *any* criminal conduct by gang members.' (Pen. Code, § 186.22, subd. (b), italics added.) Therefore, defendant's own [underlying offense] qualified as the gang-related criminal activity. No further evidence on this element was necessary." (*People v. Hill* (2006) 142 Cal.App.4th 770, 774.)[5]

Officer Dominguez, the gang expert, opined the shooting of Castellanos would have furthered the following gang-related goals. Hispanic gangs in particular "are very turf oriented." A gang generally gains power and control over its claimed territory by means of fear and intimidation. By refusing to assist the authorities in pursuing a case against Castellanos for having shot Vanegas in the first place, Vanegas was abiding by a gang code that prohibits cooperation with the police. This rule is enforced because "the gang feels that it should control its neighborhood, its own members. And by extension,

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[5] Vanegas cites the Ninth Circuit case of *Garcia v. Carey* (9th Cir. 2005) 395 F.3d 1099, but *Garcia*'s conclusion – that there must be evidence of an intent to assist in the commission of some felony *other than* the charged crimes – has been uniformly rejected by California case law. "In *Garcia*, the Ninth Circuit found insufficient evidence of specific intent to promote, further, or assist in *other* criminal conduct by the defendant's gang. We disagree with *Garcia*'s interpretation of the California statute, and decline to follow it. [Citations.] By its plain language, the statute requires a showing of specific intent to promote, further, or assist in '*any* criminal conduct by gang members,' rather than *other* criminal conduct. (§ 186.22, subd. (b)(1), italics added.)" (*People v. Romero* (2006) 140 Cal.App.4th 15, 19; accord *People v. Vazquez* (2009) 178 Cal.App.4th 347, 353-354; *People v. Hill*, *supra*, 142 Cal.App.4th at p. 774.)

the residents of that neighborhood are held to the same accountability. You do not cooperate with authorities."

Committing a homicide qualifies as "putting in work," which is a way of gaining respect within gang culture. That the victim here was not just any rival gang member, but someone who had earlier shot Vanegas in front of his own home was important. "To preserve your honor you don't have somebody else solve your problems. You solve them yourself." "If Mr. Vanegas felt he had been shot at not only in his own neighborhood but in front of his own residence, that's the ultimate disrespect. You're being disrespected on your own stoop . . . as it were. There's an expectation that you get payback."

That the shooting occurred in the middle of the afternoon at a very busy intersection, where it would be seen by lots of people, was also important. "It's . . . not only going to be seen by residents of your own neighborhood, members of your own gang, but quite possibly members of the rival gang." The sheer brazenness of the shooting was intended to impress the entire community.

Based on this testimony from the gang expert, the jury reasonably concluded the specific intent element of section 186.22, subdivision (b)(1), was satisfied: Vanegas felt compelled to murder Castellanos for all these gang-related reasons and, in the process, he shot and wounded Ng.[6]

The gang enhancement was properly imposed in connection with Vanegas's conviction for assaulting Ng.

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[6] Of course, Vanegas need not have specifically intended to shoot Ng to be guilty of assaulting him. "[A]ssault is a general intent crime." (*People v. Chance* (2008) 44 Cal.4th 1164, 1167.) "[A]ssault only requires an intentional act and actual knowledge of those facts sufficient to establish that the act by its nature will probably and directly result in the application of physical force against another." (*People v. Williams, supra,* 26 Cal.4th at p. 790.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KLEIN, P. J.

We concur:

KITCHING, J.

ALDRICH, J.